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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 600

ALCIDES PEREZ,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

CASES CITED:

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To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Alcides Perez, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment entered against him on May 1, 1970.

A. The Opinion Below

On May 1, 1970, the Petitioner's appeal to the United States Court of Appeals for the Second Circuit was affirmed and a copy of the Opinion is annexed hereto and marked as Appendix A.

B. Jurisdiction

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by Writ of Certiorari is sought of a judgment of the affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Question Presented

Whether or not the statutory sections under which the Petitioner was convicted constituted an unconstitutional exercise of legislative power by the Congress.

D. Constitutional Provisions and Statutes

Title 18, United States Code, Section 891; Title 18, United States Code, Section 892; Title 18, United States Code, Section 893; Title 18, United States Code, Section 894; Title 18, United States Code, Section 895; Title 18, United States Code, Section 896; Title 28, United States Code, Section 1254(1).

Art. 1, Sec. 8, Cl. 3; Art. 1, Sect. 8, Cl. 4; Fifth Amendment; Tenth Amendment; Rule 19, Supreme Court Rules.

E. Statement of the Case

The Petitioner, Alcides Perez, was convicted in the United States District Court for the Eastern District of New York before the Honorable George Rosling and a jury on five counts of using extortionate means to collect or attempt to

collect extensions of credit in violation of Title 18, United States Code, Sections 891 and 894. The Petitioner was sentenced to eighteen months imprisonment on each count to run concurrently.

The Petitioner attacked the constitutionality of the statutes under which he was convicted by a motion to dismiss the indictment at his trial and in his appeal of the subsequent conviction to the United States Court of Appeals for the Second Circuit. The Court of Appeals while acknowledging the force of the Petitioner's position[1] nevertheless found Chapter 42 of Title 18, the Federal anti-loan sharking statute, constitutional, the Honorable Paul R. Hays, Circuit Judge, dissenting.

Title 18, United States Code, Chapter 42, Sections 891 through 896 deal with "extortionate credit transactions" and was enacted as Title II of the Consumer Credit Protection Act of 1968. The statute was a far reaching attempt to control "the vicious billion dollar a year loan sharking racket".[2] Section 891 defines "extortionate extension of credit" as one in which the understanding of both creditor and debtor is that failure to make timely repayment "could result in the use of violence or other criminal means to cause harm to the person . . ." Title 18, United States Code, Section 891.

Section 892(a) imposes the onerous penalty of imprisonment of not more than twenty years or a fine of not more than $10,000.00 or both for the making of an extortionate ex-

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[1] *United States* v. *Perez*, Slip Op. 2655 (2nd Cir. May 1, 1970), page 2659.

[2] 114 Cong. Rec. 14384 (1968).

tension of credit. Sub-section (b) of Section 892 sets forth various indicia that characterize extortionate credit extensions such as exessive interest rate, legal unenforceability of the obligation, and the reasonable belief of the creditor that he will come to harm if he fails to comply with the terms of his agreement.

Section 893 proscribes the "financing of extortionate credit transactions".

Finally, Section 894 (a) punishes the collection or attempt to collect credit extensions by "extortionate means". Section 894 (a) (1) provides the same penalty as enumerated in Section 892 (a), *supra*.

ARGUMENT

The Statutory Sections under which the Petitioner was convicted constitute an unconstitutional exercise of legislative power by the Congress.

The federal anti-loan sharking statute, Title 18, United States Code, Chapter 42, constitutes an extensive, pervasive and unrestricted regulation of intrastate crime. The statute fails to include as an element of the offense proscribed any federal connection, and further fails to make even the slightest attempt to delimit the conduct proscribed to the smallest possible class consistent with the avowed findings and purposes of the statute. Congress declared two alternative, constitutional bases for this unprecedented legislation: The Congressional power to establish uniform and effective laws on the subject of bankruptcy (Art. 1, Sect. 8, Cl. 4, United States Constitution), and the Congressional

power under the Commerce Clause (Art. 1, Sect. 8, Cl. 3, United States Constitution).

The Petitioner submits that the instant legislation goes so far beyond the Congressional prerogatives under either the bankruptcy or commerce clause that it obliterates the fundamental distinction underlying the Tenth Amendment to the United States Constitution.

A. Bankruptcy Clause

Article 1, Section 8, Clause 4 of the United States Constitution authorizes Congress to establish "uniform laws on the subject of bankruptcies throughout the United States. . . ." As explained in the conference report on this legislation, the purpose of the bankruptcy laws was to permit debtors to discharge certain obligations, and that purpose could not be achieved with regard to obligations concerning which extortionate means were to be employed.

We know of nothing remotely resembling this exercise of power under the bankruptcy clause prior to the sections in question. Our contention is simply this. Congress may well have power to prohibit extortionate means of recovering obligations as applied to individuals actually in bankruptcy. To undertake to impose criminal penalties with regard to loans to individuals not in bankruptcy and who do not go into bankruptcy on the possibility that they might go into bankruptcy, seems to us an extravagant interpretation of the bankruptcy power. If the bankruptcy section is found to sustain this kind of power, it is hard to visualize any kind of commercial transaction for which a rationale could not be found that would bring it within the Con-

gressional bankruptcy clause.[3] As Judge Hays observed,

> ". . . this reasoning would lead logically to the conclusion that under the Bankruptcy Clause Congress could exercise complete control over all economic activity since almost any such activity might have some effect on a bankrupt's debts. The power of Congress under the Bankruptcy Clause does not appear to us to be capable of such an all-inclusive construction. Making a federal crime of every threat to collect or attempt to collect an extension of credit is not reasonably related to assuring debtors of their right to discharge in bankruptcy. The relationship is so artificial and tenuous that the power to enact the statute cannot properly be rested on the Bankruptcy Clause." Opinion, Page 2673.

We submit that this basis for the statutory scheme involved is palpably invalid and unconstitutional.

B. The Commerce Clause

Despite the fact "that almost all federal criminal statutes are so drafted that the connection with federal interests—the federal jurisdictional peg—must be proved in each case because such connection is incorporated into the definition of the offense,"[4] the instant legislation proscribes all extortionate credit transactions whether or not, in an individual case, the transaction affects interstate commerce.

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[3] The Court of Appeals for the Second Circuit concluding that Chapter 42 was a constitutional exercise of legislative power under the Commerce Clause, did not reach the basis under the Bankruptcy Clause although the Court of Appeals for the Seventh Circuit has upheld the constitutionality of this statute under both the Bankruptcy and Commerce Clauses. *United States* v. *Biancofiori*, F. 2d February 2, 1970.

[4] Opinion, page 2659.

Rather than require that the Federal connection be proven in each prosecution beyond a reasonable doubt, Congress instead asserted its jurisdiction on the basis of certain "Findings and Delaration of Purpose."

"(a) The Congress makes the following findings:

(1) Organized crime is interstate and international in character. Its activities involve many billions of dollars each year. It is directly responsible for murders, willful injuries to person and property, corruption of officials, and terrorization of countless citizens. A substantial part of the income of organized crime is generated by extortionate credit transactions.

(2) Extortionate credit transactions are characterized by the use, or the express or implicit threat of the use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment. Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the protection of constitutional rights.

(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.

(4) Extortionate credit transactions directly impair the effectiveness and frustrate the purposes of the laws enacted by the Congress on the subject of bankruptcies.

(b) On the basis of the findings stated in subsection (a) of this section, the Congress determines that the

> provisions of chapter 42 of title 18 of the United States Code are necessary and proper for the purpose of carrying into execution the powers of Congress to regulate commerce and to establish uniform and effective laws on the subject of bankruptcy." Section 201 of Pub. L. 90-321, 82 Stat. 146, 159 (1968)

The substitution of Congressional Findings of its own jurisdiction for a judicial determination of that issue on a case by case basis raises complex, substantial and compelling questions.

First and most crucial, may Congress simply declare a broad area of criminal conduct subject to its regulatory powers under the Commerce Clause and then proceed to punish even wholly intrastate crime that happens to fall within that class.

Although this Court has upheld the power of Congress under the Commerce Clause to regulate in this way certain classes of conduct, *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241 (1964), *Katzenbach* v. *McClung,* 379 U.S. 294 (1964) and *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), never has this Court upheld such regulation over so broad and unrestricted a class. The instant legislation punishes all loan-sharking no matter how small the amount of the transaction, what the relationship between the parties may have been, how many such transactions a given defendant may have been involved with, whether the creditor is an "independent operator" or in association with others. The unqualified, all-pervasive scope of conduct proscribed here stands in sharp contrast to previous legislation of this kind where Congress has required a definite and limiting relationship between the class of conduct proscribed and interstate commerce. In *Atlanta Motel, supra,* the statute was

applicable only to motels which provide lodging to transient guests; in *McClung, supra,* to restaurants that served food, a substantial portion of which had "moved in commerce"; and in *Maryland* v. *Wirtz, supra,* to employees of enterprises engaged in commerce or in the production of goods for commerce.

Certainly, if a fisherman is licensed to catch only big fish and claims that the only practical way he can catch them is to use a net, if he is to be allowed to use a net at all, he should be required to use one that will allow at least the small fish to swim through.

A second group of questions raised pointedly by this statute relate to the "Congressional Findings" themselves. "The mere use of the words 'affects interstate commerce' cannot justify the abdication of judicial responsibility to interpret constitutional limitations on federal power." Opnion, Judge Hays, page 2676. Apparently concurring in this view with Judge Hays, the majority below sought to determine

> "Whether there is a rational connection between the class of such intrastate activities, sensibly defined, and interstate commerce". Opinion, p. 2666

But, what are the requisites of a "rational connection"?

If Congress had taken an objective sample of state loan sharking prosecutions and determined as to each whether a federal element existed,[5] what percentage of the "federal" cases would be sufficient to support a finding of "rational

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[5] e.g., Whether the defendant was believed to be connected with organized crime, whether some interstate facility was used in connection with the transaction or whether the transaction had some other direct and discernible impact on interstate commerce.

connection?" This Court has defined the "rational connection" standard in a slightly different context. In holding the 21 U.S.C. 176(a) presumption of knowledge of illegal importation unconstitutional, the Court stated that

> "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. And in the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily." *Leary* v. *United States,* 395 U.S. 6 at 24.

The fact presumed in *Leary, supra,* knowledge of illegal importation, and the facts presumed in the instant statute, the Congressional Findings, must "more likely than not flow from the proved fact on which it is made to depend."

Applying these criteria to a sample of loan-sharking cases, it is clear that at least a majority of these would have to be found to contain a federal element in order to sustain a "rational connection" between loan-sharking, the fact proved, and an affect upon interstate commerce, the fact presumed. Furthermore, since in the instant statute the presumption is irrebutable and since the failure of this statute to make a federal connection an element of the crime is justified by the assertion that almost all instances of loan-sharking affect interstate commerce, the degree of probability required to support a "rational connection" should be greater than that required in *Leary, supra.*

But, the Congressional Findings, no matter how heavily they are weighed, cannot survive even the minimal requisites of *Leary.* Congress made no statistical analysis of the legion

of state loan-sharking prosecutions; in point of fact, Congress failed even to hold hearings. The real basis of the "findings" is the claimed relationship between 'organized crime' and loan sharking. If in fact such an entity as organized crime exists the present lack of real information as opposed to mere speculation precludes even the possibility of making reasonably sound findings of fact relating to it. If the bulk of the supposed members of organized crime cannot be identified nor the extent of its organization or operations clearly defined, the Congressional Finding that the proceeds of loan-sharking constitute a substantial portion of the income of organized crime must surely be suspect.

Finally, the totally pervasive and unrestricted Federal regulation of purely local criminal conduct is especially repugnant. In the single instance where this Court considered the kind of regulation of intrastate crime embodied in Chapter 42, *United States* v. *Denmark*, 346 U.S. 441, a majority of the Court doubted the constitutionality of an attempt to regulate the intrastate activity of those engaged in commercial gambling, while none of the justices upheld such a power.

Laws that proscribe criminal conduct reflect, both in terms of the activity proscribed and the sanction imposed, the attitude and views of the societal or governmental unit which makes the laws. As a result, a class of conduct which is proscribed in one state may not be proscribed in another; the penalty for the commission of a crime in one state may be vastly different in degree from that imposed in another. The benefit that results from this kind of cultural relativism is that a criminal defendant having been conditioned by the ethics and mores of a geographical area will be governed by a set of procedures and penalties that reflect the very same mores and ethics that conditioned his unlawful act. When a

young child smears paint on the walls of his home, he is subject to and can rightfully expect responses from his parents based upon the attitudes and value structures which they have instilled in him. Yet when the young child smears paint on the walls of his neighbor's house he will expect a different set of responses and in a very real sense, he is committing a different act. When a defendant has committed an act punishable by the laws of the State of New York, he subjects himself to the procedures and penalties of the State of New York; but when a defendant has committed an act which intrudes upon interstate commerce, he makes himself subject to a different set of procedures and sanctions, and properly so, and he invests in the United States a legitimate interest in deterring such conduct.

Chapter 42 does not limit the scope of its application to conduct which does in fact affect interstate commerce. Not only does this Chapter fail to exclude from its sanctions acts completely intrastate, it totally precludes, by operation of the Congressional Findings and Declaration of Purpose, any possibility of such exclusion. The terrible result is that this Chapter proscribes and punishes conduct which it was never intended to affect.

If this kind of legislation can be countenanced in other areas, it cannot be tolerated when one who may be innocent of any violation of a *Federal* interest is swept up indiscriminately by this statutory dragnet and made subject to a possible incarceration of twenty years.

The effect of Chapter 42 is the proscription of a class of conduct, some of which conduct Congress is empowered to proscribe and some of which Congress is not empowered to proscribe. When the procedures by which the guilt or

innocence of a criminal defendant are to be affected and the jeopardy that attaches once the determination of guilt is made is fixed as a result of a finding that interstate commerce is affected, due process requires that such a finding be proven in each and every case beyond a reasonable doubt.

In conclusion, we submit that the urgent need for resolution of the issues made in this Petition goes even beyond the horrific consequences of unlawful incarceration. If Congress can punish under the Commerce Clause local loansharking solely on the basis of its own unreviewed, irrebutable findings, it can punish any crime relating in any way to money or property committed anywhere in this country. The implications of this statute are awesome and the substantial question of its constitutionality should therefore be speedily resolved.

CONCLUSION

For the reasons here and above set forth this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 248—September Term, 1969.

(Argued December 1, 1969 Decided May 1, 1970.)

Docket No. 33767

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALCIDES PEREZ,

Appellant.

Before:

WATERMAN, HAYS and FEINBERG,

Circuit Judges.

Appeal from judgment of conviction after jury verdict, by United States District Court for the Eastern District of New York, George Rosling, *J.*, of use of extortionate means to collect extensions of credit. 18 U.S.C. §§891, 894, which prohibited the use of such means, was within Congressional power. Affirmed.

LEONARD H. SANDLER, New York, N. Y. (Albert J. Krieger, New York, N. Y., on the brief), *for Appellant.*

ROGER A. PAULEY, Attorney, United States Department of Justice, Washington, D. C. (Edward R. Neaher, United States Attor-

ney for the Eastern District of New York, Jerome M. Feit, Attorney, United States Department of Justice, Washington, D. C., on the brief), *for Appellee.*

FEINBERG, *Circuit Judge*:

Alcides Perez appeals from a judgment of the United States District Court for the Eastern District of New York, George Rosling, *J.*, entered on a jury verdict convicting him of five counts of using extortionate means to collect or attempt to collect extensions of credit. 18 U.S.C. §§891, 894. Although appellant claims various errors in his trial, his major argument on appeal is that Congress did not have the power to pass the statute under which appellant was convicted, either under the Commerce Clause or the Bankruptcy Clause of the Constitution. We hold that the trial was proper and the evidence sufficient, and that Congress has the power to prohibit extortionate credit transactions.

The facts underlying appellant's conviction may be stated briefly. The victim of appellant's brutal collection methods was Alexis Miranda, a 26-year-old married butcher with three children, who was attempting to open his own butcher shop. Unable to obtain operating capital by a loan through such legitimate channels as the Chase Manhattan Bank and the Small Business Administration, Miranda made the mistake of borrowing some $3,000 from Perez. From the record, the rate of interest was somewhat vague but it was obviously large enough to perpetuate the indebtedness forever. Miranda initially had to make repayments at a rate of $105 per week; Perez subsequently raised

that to $130 a week, then to $205 and finally to $330. Miranda indicated that in all he paid some $6,500, but after many months of repayment he was still some $6,700 in debt. Miranda also testified that, when he had difficulty in paying these sums, Perez threatened him with hospitalization, harm to his family, the attention of persons higher in the moneylending chain, as well as an ominous "or else," if repayments should not be promptly forthcoming. Miranda hovered on the brink of insolvency, doubtless in large part because of the high payments to Perez, and was able to pay Perez only by obtaining meat on short-term credit, and then delaying his payments to suppliers. Finally driven to the wall, Miranda abandoned his business and fled to Puerto Rico, leaving his debts, legitimate and illegitimate, behind. On Miranda's return, appellant found him and again hounded him for further payment until appellant was arrested.

I.

Appellant's principal contention is that the statute under which he was convicted is unconstitutional in prohibiting all extortionate credit transactions, without requiring a showing in a particular case of effect on interstate commerce, or connection with the Bankruptcy Act. The statute was enacted as Title II of the Consumer Credit Protection Act of 1968 and amended Title 18 of the United States Code by adding Chapter 42, sections 891-96, which deal with "Extortionate Credit Transactions." According to the legislative history, the statute was a far-reaching attempt to control "the vicious billion dollar a year loan-sharking

racket," 114 Cong. Rec. 14384 (1968), and "a deliberate legislative attack on the economic foundations of organized crime." Conf. Rep. No. 1397, 90th Cong., 2d Sess. (1968), U.S. Code Cong. & Adm. News 2029. Section 891 defines "extortionate extension of credit" as one characterized by an understanding of both the creditor and debtor that delay in, or failure to make, repayment "could result in the use of violence or other criminal means to cause harm to the person . . . ." 18 U.S.C. §891. Section 892(a) provides the heavy penalty of imprisonment for not more than 20 years or a fine of not more than $10,000, or both, for any person making such an "extortionate extension of credit." Subsection (b) of the same section provides various indicia of whether an extension of credit is extortionate, including an excessive interest rate, the inability of the creditor to legally enforce the debt, and the reasonable belief of the debtor that the creditor has used extortionate means to collect debts in the past. Section 893 prohibits the "financing" of extortionate extensions of credit, an obvious attempt "to make possible the prosecution of the upper levels of the criminal hierarchy." Conf. Rep. No. 1397, *supra*, U.S. Code Cong. & Adm. News at 2027. Finally, section 894(a)—the section involved here—punishes the actual collection or attempt to collect any extension of credit by "extortionate means." Section 894(a) (1) places the same heavy penalties used in section 892 on anyone who

> (a) . . . knowingly participates in any way, or conspires to do so, in the use of any extortionate means
>
> (1) to collect or attempt to collect any extension of credit . . . .

"Extortionate means" is defined in section 891(7) as

> any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

It is clear from the above that the statute is a comprehensive federal attack on loan-sharking. Whatever may be the desirability of such national action, the question before us is whether Congress acted constitutionally.

II.

We turn now to a consideration of the power of Congress under the Commerce Clause of the Constitution, which in Article I, section 8 authorizes Congress to regulate "Commerce . . . among the several States." As we understand appellant's argument, he concedes that Congress would indeed have power to reach the activities of Perez if it were shown that some instrumentality of commerce were used either to effect the threats or to repay the loan, or that the loan itself was in, or affected, interstate commerce, or was connected in some specific way therewith. According to appellant, however, Congress cannot regulate (at least by simple criminal prohibition) a wholly intrastate individual transaction without some proof in the criminal prosecution that the transaction is thus connected with interstate commerce; since that was not done here, the conviction cannot stand. While appellant's position has force, we cannot agree that congressional power is so limited.

We will concede at the outset that almost all federal criminal statutes are so drafted that the connection with federal interests—the federal jurisdictional peg—must be proved in each case because such connection is incorporated into the definition of the offense. See, e.g., The Hobbs Act, 18 U.S.C. §1951 (obstructing or affecting interstate commerce or movements of commodities in commerce by robbery or extortion).[1] But this hardly resolves the question whether such a mode of drafting is *constitutionally* required. We assume that all would agree that the reach of federal power under the Commerce Clause is not now niggardly construed and that statutes relying upon that clause frequently apply to intrastate activity. This is made clear by the series of decisions described in *United States* v. *Darby*, 312 U.S. 100 (1941), and *Wickard* v. *Filburn*, 317 U.S. 111 (1942), and culminating in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 211 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); and *Maryland* v. *Wirtz*, 392 U.S. 192 (1968). In addition, these decisions support the proposition that individual proof of effect on interstate commerce is not required in each case, so long as Congress has made a rational overall determination.

In *United States* v. *Darby, supra*, 312 U.S. at 118, the formulation put forward by Justice Stone was whether the regulation of intrastate activity was an "appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate

[1] See also 18 U.S.C. §875 (transmitting kidnapping or extortion threats by means of interstate commerce); 18 U.S.C. §2421 (transporting women in interstate commerce for prostitution, etc.).

commerce." This demands an evaluation, not of the effect of a particular item of intrastate activity on interstate commerce, but the effect of intrastate activity, as a whole, on interstate commerce. A similar approach was apparent in *Wickard* v. *Filburn, supra,* 317 U.S. at 127-28, where the Court said:

> That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

The point was made even clearer by the decisions in *Atlanta Motel, McClung* and *Maryland.* In the first, the Court considered the constitutionality of Title II of the Civil Rights Act of 1964. Section 201(c) thereof, 42 U.S.C. §2000a(c), conclusively declares, with exceptions not here important, that any motel "which provides lodging to transient guests" affects commerce *per se.* See *Atlanta Motel,* 379 U.S. at 247. To establish coverage under the Act in an individual case, there is no need to show that any particular guests are engaged in interstate travel; the congressional presumption of effect on interstate commerce is conclusive. In testing the constitutionality of the statute as applied to the Atlanta Motel, the Court did not look to proof of individual connection between the motel and interstate commerce. Instead it examined the basis of legislative action on the evidence available to Congress, pointing out, *id.* at 258:

> The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by

> motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate.

In *Katzenbach* v. *McClung, supra,* the Court again considered Title II of the Civil Rights Act, this time in its application to a restaurant as to which Congress did require, unlike motels, that a particular connection with interstate commerce be shown in the individual case; i.e., "a substantial portion of the food" served by the restaurant "has moved in commerce." However, appellants claimed that since the restaurant served only intrastate patrons, this was not enough to justify regulation under the Commerce Clause. As the Court put it, 379 U.S. at 303, appellants

> object to the omission of a provision for a case-by-case determination—judicial or administrative—that racial discrimination in a particular restaurant affects commerce.

The Court rejected this argument, 379 U.S. at 303-05:

> But Congress' action in framing this Act was not unprecedented. In *United States* v. *Darby,* 312 U.S. 100 (1941), this Court held constitutional the Fair Labor Standards Act of 1938. There Congress determined that the payment of substandard wages to employees engaged in the production of goods for commerce, while not itself commerce, so inhibited it as to be subject to federal regulation. The appellees in that case argued, as do the appellees here, that the Act was invalid because it included no provision for an independent inquiry regarding the effect on commerce of substandard wages in a particular business. (Brief for appellees, pp. 76-77, *United States* v.

Darby, 312 U.S. 100.) But the Court rejected the argument, observing that:

> "[S]ometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power." At 120-121.
>
> • • • • •
>
> Confronted as we are with the facts laid before Congress, we must conclude that [Congress] had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. . . . Congress prohibited discrimination only in those establishments having a close tie to interstate commerce, i.e., those, like the McClungs, serving food that has come from out of the State. We think in so doing that Congress *acted well within its power* to protect and foster commerce in extending the coverage of Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce.
>
> *The absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food*, a factor on which the appellees place much reliance, *is not, given the evidence as to the effect of such practices on other aspects of commerce, a crucial matter.* [Footnote omitted; emphasis added.]

Finally, in *Maryland* v. *Wirtz, supra*, the Court considered the constitutionality of an extension of the Fair Labor Standards Act to cover all employees of an "enter-

prise" engaged in commerce or production for commerce. The argument was made that if only a few employees of an "enterprise" are so engaged, labor conditions in such a business "may not affect commerce very much or very often." To this, the Court replied, 392 U.S. at 192-93:

> [W]hile Congress has in some instances left to the courts or to administrative agencies the task of determining whether commerce is affected in a particular instance, *Darby* itself recognized the power of Congress instead to declare that an entire class of activities affects commerce. The only question for the courts is then whether the class is "within reach of the federal power." The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest. Wickard v. Filburn, 317 U.S. 111, 127-128; Polish Alliance v. Labor Bd., 322 U.S. 643, 648; Katzenbach v. McClung, [379 U.S. 294] 301 .... [Footnotes omitted.]

The Court went on to point out, 392 U.S. at 197 n. 27:

> Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.

From these authorities, we conclude that whatever may have been the rule in earlier days, see generally, Schwartz, The Powers of Government, 178-237 (1963); Stern, The Scope of the Phrase *Interstate Commerce*, 41 A.B.A. J.

823 (1955), the present state of the law is that Congress can regulate intrastate transactions if a proper determination has been made that *as a class* such transactions affect or involve interstate commerce.[2] This conclusion is reinforced by the judicial treatment of the 1965 amendments to the Food, Drug and Cosmetic Act, 21 U.S.C. §§331(q), 360a, which make it a crime under certain circumstances to manufacture, process, sell or possess any depressant or stimulant drug. Like the statute here under attack, these amendments do not require a showing in each case that interstate commerce has been affected. Nevertheless, several circuit courts to date have sustained convictions thereunder in the face of the argument that such an individual showing is constitutionally required. See *United States* v. *Cerrito,* 413 F.2d 1270 (7th Cir. 1969), cert. denied, —— U.S. —— (1970); *White* v. *United States,* 399 F.2d 813, 823 (8th Cir. 1968); *Deyo* v. *United States,* 396 F.2d 595 (9th Cir. 1968); *White* v. *United States,* 395 F.2d 5 (1st Cir.), cert. denied, 393 U.S. 928 (1968).

The heart of appellant's argument in this case is that the Constitution requires that a determination be made in each prosecution under 18 U.S.C. §894 that interstate commerce is involved and that this determination must be made in a judicial proceeding. We believe that the decisions cited above at pp. 2660-2664 indicate that neither proposition stands up. So long as a class of intrastate transactions considered as a whole has a substantial effect on interstate commerce, Congress can regulate a particular intrastate transaction in the class even though in that

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[2] See also *United States* v. *Minor,* 396 U.S. 87, 98 n. 13 (1969).

instance the effect on intersatte commerce is minimal or non-existent. If this is so, then proof in that individual case that there was some connection with, or effect on, interstate commerce should not have constitutional significance. That Congress may require such proof in a particular case—as it frequently does but did not here—is a matter of legislative policy or drafting technique. But it should not be controlling on the constitutional issue whether the particular intrastate activity may be federally regulated. The crucial question instead is whether there is a rational connection between the class of such intrastate activities, sensibly defined, and interstate commerce.

Appellant places his main reliance on *United States* v. *Five Gambling Devices* (*United States* v. *Denmark*), 346 U.S. 441 (1953), which involved a statute, 15 U.S.C. §117, which required manufacturers and dealers in gambling devices to register and file periodic information. In that case, Mr. Justice Jackson, speaking for himself and two other justices stated that "penalizing failure to report information concerning acts not shown to be in, or mingled with, or found to affect commerce . . . raise[s] . . . a far-reaching question." *Id.* at 446-47. Mr. Justice Clark, dissenting for four members of the Court, 346 U.S. at 462-63, agreed that if Congress "had sought to *regulate* local activities, its power would no doubt be less clear," but nevertheless noted that:

> [T]he situation here is unique: the commodity involved is peculiarly tied to organized interstate crime and is itself illegal in the great majority of the states, and the federal law in issue was actively sought by local and state law enforcement officials as a means

> to assist them, not supplant them in local law enforcement.

With all respect, it seems to us that all that both the opinions of Justices Clark and Jackson can be read to stand for is that the question is a substantial one. See Schwartz, *op. cit. supra,* at 236-37. We agree with the Court of Appeals for the First Circuit that the Supreme Court in *Atlanta Motel* has since indicated "its willingness in a proper case to approve legislation declaring that certain activities affect interstate commerce per se without requiring proof in each case." See *White* v. *United States,* 395 F.2d 5, 8 n. 3 (1st Cir.), cert. denied, 393 U.S. 928 (1968).

Therefore, it seems reasonably clear that Congress can regulate intrastate activity without any showing in a particular case that the activity affected interstate commerce, provided that a proper determination has been made that such intrastate activity, considered as a class, does have such effect and that the means selected to deal with it are reasonable and appropriate. To those questions, we now turn.

III.

As enacted, the statute here under attack contained the following Findings and Declaration of Purpose:[3]

> (a) The Congress makes the following findings:
>
> (1) Organized crime is interstate and international in character. Its activities involve many billions of dollars each year. It is directly responsible for murders, willful injuries to person and

[3] Section 201 of Pub. L. 90-321, 82 Stat. 146, 159 (1968).

property, corruption of officials, and terrorization of countless citizens. A substantial part of the income of organized crime is generated by extortionate credit transactions.

(2) Extortionate credit transactions are characterized by the use, or the express or implicit threat of the use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment. Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the protection of constitutional rights.

(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.

(4) Extortionate credit transactions directly impair the effectiveness and frustrate the purposes of the laws enacted by the Congress on the subject of bankrupties.

(b) On the basis of the findings stated in subsection (a) of this section, the Congress determines that the provisions of chapter 42 of titl e18 of the United States Code are necessary and proper for the purpose of carrying into execution the powers of Congress to regulate commerce and to establish uniform and effective laws on the subject of bankruptcy.

Thus, Congress found that a typical extortionate credit transaction is either itself in interstate or foreign com-

merce or affects such commerce, or uses the means and instrumentalities thereof. There is no reason to doubt that these findings of legislative fact are true. There was considerable evidence at congressional hearings or otherwise available to Congress, as the Conference Report on this legislation noted,[4] that organized crime monopolizes loan-sharking in the metropolitan areas of the country, that money flows into loan-sharking from other illicit activities regardless of state lines, and that the profits flow back into the other activities of organized crime, including the take-over of legitimate business. See The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime, *passim*, particularly 2-3, 6-7, 11 (1967); Hearings on Impact of Crime on Small Business, S. Comm. on Small Business, 90th Cong., 2d Sess. (1968), particularly statements of Ralph Salerno and Henry Ruth, at 2-30. Moreover, the available evidence indicated that loan-sharking is so effective and lucrative because of high-level organization running across state lines, which eliminates competition between moneylenders in metropolitan areas and infuses threats of force with the respect which ordinarily only government can evoke. See *id.* at 20-21; Schelling, Economic Analysis and Organized Crime, Task Force Report: Organized Crime, *supra*, 114-26. Loan-sharking activities can persuasively be characterized as generally in or affecting commerce precisely because such practices depend for their full effect on monopoly in metropolitan areas and national, or at least multi-state, organization. This provided a logical basis for

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[4] Conf. Rep. No. 1397, *supra*, U.S. Code Cong. & Adm. News, at 2026.

congressional focus on loan-sharking rather than on a variety of other crimes which may be far more "local" in nature, e.g., robbery, burglary, larceny. Task Force Report: Organized Crime, *supra*, 2-4. The legislative history also shows recognition by Congress that the states alone cannot control organized crime, including loan-sharking,[5] while federal efforts are better able to do so. See generally, Note, Loan-sharking: The Untouched Domain of Organized Crime, 5 Colum. J. of Law and Soc. Prob. 91, 93-110 (1969).

Accordingly, it would seem that the congressional finding that even "purely intrastate" extortionate credit transactions affect interstate commerce is a rational one and that the means chosen to deal with loan-sharking are appropriate. We note that the same conclusion has recently been reached by the Court of Appeals for the Seventh Circuit. *United States* v. *Biancofiori*, F.2d , No. 17655 (Feb. 2, 1970); accord, *United States* v. *Curcio*, F. Supp. , Crim. No. 12,625 (D. Conn. Feb. 24, 1970). Appellant does not effectively challenge these overall congressional determinations, a burden he should have to assume but does not. Instead, he argues in general terms that 18 U.S.C. §§891, 894 go further than any earlier statute and conjures up hypothetical examples of money lending that would have no effect on interstate commerce. If by the first assertion appellant means that the reach of the statute is far broader than earlier regulation of intra-

[5] See 114 Cong. Rec. 14490 (1968) (Remarks of Sen. Proxmire). See also Hearings on the Federal Effort Against Organized Crime Before a Subcommittee of the House Committee on Government Operations, 90th Cong., 1st Sess. Part I at 68-69 (1967).

state commerce on the ground that it affects interstate commerce, the claim is not accurate. Nor should the fact that this is a criminal statute be controlling. Indeed, *United States* v. *Darby, supra,* was a criminal prosecution. What the argument is reduced to is that the failure to require proof in each case of effect on commerce is a fatal defect. For reasons already given, that contention is without merit. Equally unpersuasive is the conjuring up in appellant's brief of innocent lenders suddenly enmeshed in federal criminal law; e.g.,

> [I]f someone borrows money from a friend, fails to repay it, and the lender loses his temper and threatens violence, a federal crime has occurred. More broadly, if a loan is made to a housewife, a lawyer, a doctor, a retail worker, or anyone in a host of occupations, that would have no impact on interstate commerce, or the most tenuous impact, a threat of violence to recover the debt becomes a federal crime.[6]

The examples are strangely reminiscent of dissenting opinions in earlier vindications of federal power over interstate commerce.[7] Apart from the dubious assumption that a loan from a "friend" would occasion a federal prosecution, Congress had the constitutional power to determine that the typical loan-sharking transaction has more than a "tenuous impact" on interstate commerce, and that it was necessary

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[6] Appellant's brief, p. 22.

[7] See, e.g., the dissent in *NLRB* v. *Fainblatt,* 306 U.S. 601, 610 (1939):

> If the plant presently employed only one woman who stitched one skirt during each week which the owner regularly accepted and sent to another state, Congressional power would extend to the enterprise, according to the logic of the Court's opinion.

or appropriate to include all loan-sharking within the reach of the statute. Once Congress has made those determinations, we are bound by them unless they are irrational, even if the statutory language literally applies to a few atypical transactions not now before us. What is known as legislative fact for a class of transactions—the effect on interstate commerce—is not necessarily easily provable in an individual instance of loan-sharking. Trying to trace the flow of funds from the immediate enforcer to the organization behind the loan might well be impossible in a particular case. Money, of course, is a classic fungible commodity; showing its movement interstate may be completely impossible where all that moves is cash recorded, if at all, as an intangible on someone's records or in someone's memory. Cf. *White* v. *United States, supra*, 395 F.2d at 7. In short, while appellant's examples are not the kind of loans that occasioned the statute, the vague possibility that they may be technically covered by its language does not render the statute unconstitutional.

In conclusion: Congress has determined that all loan-sharking activities should be prohibited, that even those "purely intrastate in character . . . directly affect interstate and foreign commerce," and that the statute here involved is a necessary legislative response to eliminate an obvious evil. We do not feel justified in setting aside these determinations; we hold the statute constitutional.[8]

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[8] It is therefore unnecessary to deal with the Government's alternate contention that the statute is an "appropriate" exercise of congressional power to preserve the effectiveness of the bankruptcy laws, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 409-20 (1819); see Conf. Rep., *supra*, U.S. Code Cong. & Adm. News, at 2025-26, although the Seventh Circuit has accepted this argument. *United States* v. *Biancofiori, supra*.

IV.

Finally, appellant contends that the jury verdict was not supported by credible evidence because of contradictions in the testimony of Miranda. The evidence showed that on five separate occasions Perez threatened Miranda with the use of violence unless Miranda made payments on various loans that Perez had arranged for him. Miranda's testimony was corroborated in part by his wife and by one of his employees. Any contradictions were for the jury to consider in assessing his credibility.

Appellant also argues that a statement by the prosecution on summation improperly buttressed Miranda's testimony. Even if the statement was erroneous, the issue is not available on appeal since no objection was made. See *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), cert denied, 383 U.S. 907 (1966).

Appellant's contention that he was prejudiced by the failure of the prosecution to accept a defense stipulation as to appellant's signature on a check is equally without merit.

Judgment affirmed.

HAYS, *Circuit Judge* (dissenting):

In my opinion the conviction should be reversed because Congress exceeded its constitutional powers in enacting the statute on which the conviction was based.

I.

I do not believe that the power to extend federal criminal law to cover extortionate credit transactions can be found in the Bankruptcy Clause. The statute is clearly not a uniform law on the subject of bankruptcy. Congress has sought to justify the statute on the ground that, if extortionate means are used to collect an extension of credit, the debtor may be deprived of his right to a discharge in bankruptcy. But this reasoning would lead logically to the conclusion that under the Bankruptcy Clause Congress could exercise complete control over all economic activity since almost any such activity might have some effect on a bankrupt's debts. The power of Congress under the Bankruptcy Clause does not appear to us to be capable of such an all-inclusive construction. Making a federal crime of every threat to collect or attempt to collect an extension of credit is not reasonably related to assuring debtors of their right to discharge in bankruptcy. The relationship is so artificial and tenuous that the power to enact the statute cannot properly be rested on the Bankruptcy Clause.

If the statute is valid it must be so because it is within the scope of congressional authority to regulate interstate commerce.

But the statute does not require the government to prove, as an element of the crime, that either the threat of violence or the credit extension at issue had any effect whatsoever upon or any relation to interstate commerce. Although the Congressional findings refer to organized crime there is no requirement in the statute that the prosecution establish any connection between organized crime and the

transaction which is condemned. Every instance of the use of extortionate means to collect an extension of credit is made a federal crime without regard to the relationship of the parties or their identity. Nor is there any requirement that the debt involved in the prosecution be of any particular nature or that any minimum amount be involved. Every trivial, insignificant and purely local act of the kind condemned is made a federal crime without any requirement of showing any connection with or effect upon interstate commerce. It is quite clear that not every extortionate act, no matter how small the debt involved, has any significant effect on interstate commerce.

There is no reason to believe that using threats to collect debts has any more effect upon interstate commerce than any other crime involving property. If extortionate conduct unrelated to interstate commerce can be made a federal crime, so can such crimes as robbery, burglary and larceny.

The statute here questioned is unprecedented in making a federal crime of conduct related to interstate commerce only by an assumed effect on such commerce. In all previous federal criminal statutes proof of some specific connection with interstate commerce such as movement across state lines or the use of some instrumentality of interstate commerce, such as the mails, has been required.

There is no Supreme Court case which suggests that Congress can ignore the requirement that some connection with interstate commerce must be established as a basis for conviction of a federal crime where the power of Congress to enact the statute is derived from the commerce clause. In *United States* v. *Denmarkr*, 346 U.S. 441 (1953),

the constitutionality of Section 3 of the Johnson Act was in issue. That provision required "every manufacturer and dealer in gambling devices annually to register his business and name and monthly to file detailed information as to each device sold and delivered during the preceding month." *Id.* at 443. An opinion written by Mr. Justice Jackson and joined by two other justices construed the Act as not applying to "purely intrastate matters." *Id.* at 450. To hold otherwise they said would raise "a far-reaching question as to the extent of congressional power over matters internal to the individual states." *Id.* at 447.

Two justices, who concurred in the result, believed that the statute was too vague to be enforceable, but gave no sign of disagreement as to the constitutionality of its purported effect on intrastate transactions.

Four justices dissented stating their belief that the Act was intended to cover certain intrastate matters and that it was constitutional. However, they said at 462-63:

> "If Congress by §3 had sought to *regulate* local activity, its power would no doubt be less clear. But here there is no attempt to regulate; all that is required is information in aid of enforcement of the conceded power to ban interstate transportation. The distinction is substantial."

Thus a clear majority of the Court doubted the constitutionality of an attempt to "regulate" the intrastate activities of those engaged in commercial gambling. None of the justices upheld such power. In the statute now under consideration Congress has attempted to regulate the intrastate activities of those engaged in the crime of extortion.

In seeking to uphold congressional power to enact the

statute, the majority relies principally on *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) and *Maryland* v. *Wirtz*, 392 U.S. 183 (1968). Neither in these cases nor in any of the cases cited by the majority did Congress attempt as it has here to regulate intrastate crime. Moreover, in each of the three statutes involved in the cited cases Congress was careful to require a definite relationship with interstate commerce. In *Atlanta Motel*, the statute was made applicable only to motels which provide lodging to transient guests. In *McClung*, the restaurants were made subject to the statute only where a substantial portion of the food they served has "moved in commerce." In *Maryland* v. *Wirtz*, the employees covered by the statute were employees of enterprises engaged in commerce or in production of goods for commerce.

In the present case there is no requirement that the conduct sought to be regulated have any connection whatever with commerce. The mere use of the words "affects international commerce" cannot justify the abdication of judicial responsibility to interpret constitutional limitations on federal power. Here Congress has sought to use the Commerce Clause as a basis for criminal sanctions on purely local activity. I think that the prohibition of all extortionate credit transactions is not within the congressional power to regulate interstate commerce. I therefore respectfully dissent.

APPENDIX B

Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of May, one thousand nine hundred and seventy.

Present:

HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALCIDES PEREZ,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 33767

UNITED STATES OF AMERICA,

—v.—

ALCIDES PEREZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING OR IN THE ALTERNATIVE FOR THE ISSUANCE OF AN ORDER STAYING THE MANDATE OF THIS COURT AND CONTINUING THE APPELLANT ON BAIL PENDING APPLICATION FOR CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To The United States Court Of Appeals For The Second Circuit:

The appellant above named respectfully petitions this Honorable Court for a rehearing of the appeal in the above-entitled case and in support of this petition represents to the Court as follows:

The appellant reserves his argued position as to each of the points heretofore raised on appeal, but in this petition

addresses himself solely to those aspects of the opinion of this court decided on May 1, 1970 wherein the court may be convinced that its result is based on the misapprehension of certain matters pertaining to the issues originally raised on appeal.

Therefore, this petition respectfully seeks to convince the court that it has erred in its determination as to the constitutionality of Chapter 42, Title 18, United States Code.

If the instant petition for rehearing is denied, the appellant Perez respectfully petitions this court for the issuance of an order staying the mandate of this court and continuing him on bail pending the disposition of a Petition for a Writ of Certiorari to be filed with the Supreme Court of the United States in accordance with the statutes and rules applicable thereto.

As To A Rehearing Of The Limited Aspects Of This Appeal

Chapter 42 of Title 18, United States Code, Constitutes Federal Criminal Sanctions of Intrastate Activity.

In his brief and during his argument, the appellant urged upon this Court that a crucial distinction between the Congressional exercise of power under the Commerce Clause previously sanctioned by the Supreme Court and Chapter 42 is that the latter constitutes a criminal offense against the United States. In its opinion affirming appellant's conviction and declaring Chapter 42 constitutional, this court indicated by its reasoning and by the authority it cited that this distinction was at the very most insigni-

ficant. The appellant hopes to persuade the court that this distinction is of critical importance to the question of the constitutionality of Chapter 42 and that in the light of this distinction the court will reconsider its conclusions.

Laws that proscribe particular kinds of activity by criminal sanction reflect both in terms of the activity proscribed and the sanction imposed, the attitude and views of the societal or governmental unit which makes the laws. As a result, a class of conduct which is proscribed in one state may not be proscribed in another; the penalty for the commission of a crime in one state may be vastly different in degree from that imposed in another. The benefit that results from this kind of cultural relativism is that a criminal defendant having been conditioned by the ethics and mores of a geographical area will be governed by a set of procedures and penalties that reflect the very same mores and ethics that conditioned his unlawful act. When a young child smears paint on the walls of his home, he is subject to and can rightfully expect responses from his parents based upon the attitudes and value structures which they have instilled in him. Yet when the young child smears paint on the walls of his neighbor's house he will expect a different set of responses and in a very real sense, he is committing a different act. When a defendant has committed an act punishable by the laws of the State of New York, he subjects himself to the procedures and penalties of the State of New York. When a defendant has committed an act which intrudes upon interstate commerce, two things occur:

(1) He makes himself subject to a different set of procedures and sanctions, and properly so, and

(2) He invests in the United States a legitimate interest in deterring such conduct.

Unfortunately, and we submit unconstitutionally, Chapter 42 of Title 18 of the United States Code, does not limit the scope of its application to conduct which does in fact affect commerce. Not only does this Chapter fail to exclude from its sanctions acts completely intrastate, it totally precludes, by operation of the Congressional Findings and Declaration of Purpose, any possibility of such exclusion. The terrible result is that this Chapter proscribes and punishes conduct which it was never intended to affect.

While this kind of legislation can be countenanced in other areas, it cannot be tolerated when one who may be innocent of any violation of *Federal* interest is swept up indiscriminately by this statutory dragnet and made subject to a possible incarceration of twenty years.

The effect of Chapter 42 is the proscription of a class of conduct, some of which conduct Congress is empowered to proscribe. When the procedures by which the guilt or innocence of a criminal defendant are to be affected and the jeopardy that attaches once the determination of guilt is made is fixed as a result of a finding that interstate commerce is affected, due process requires that such a finding be proven in each and every case beyond a reasonable doubt.

II.

The Rationality of the Congressional Findings and Declaration of Purpose

Even if this court were to decide that an effect on interstate commerce need not be proven in each prosecution under this Chapter, the appellant nevertheless submits that the statute would still be unconstitutional by reason of the fact that there was an insufficient basis for the Congressional Findings and Declaration of Purpose.

At the outset, appellant contends that where, as here, the statutory scheme precludes any possible exclusion of instances of conduct not intended to be within its purview, the courts must require more than merely a rational basis for such Congressional Findings. We submit that such Findings must be logically compelled by all the creditable evidence available. But rather than reargue the standard of review in this Petition, we submit that the Congressional Findings do not even measure up to the standard applied by this court in its opinion or, to put it simply, that there is no rational basis for these Congressional Findings. Reducing the Congressional Findings and Declaration of Purpose to its three critical elements, Congress found:

> (1) A substantial part of the income of organized crime is generated by extortionate credit transactions;
>
> (2) Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the prosecution of constitutional rights;

(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.

Analyzing these elements separately, we find that Congress has concluded that a substantial part of the income of organized crime is generated by extortionate credit transactions. This conclusion was reached despite the fact that the present state of information available regarding organized crime is at best only tentative. In fact, "Evidence of the lack of professional attention to the economy of the underworld is the absence of reliable data even on the magnitude involved, of techniques for estimating them—even of a conceptual scheme for distinguishing profits, income, turnover, transfers, waste, destruction, and *the distribution of gains and losses due to crime.*" [Emphasis Supplied] Schelling, Economic Analysis and Organized Crime, The President's *Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime,* page 114. It is significant that the above quotation comes out of the very authority which this court cited in support of its conclusion that the Congressional Findings had a rational basis. To state it simply, the thrust of our contention here is that information on that amorphous entity referred to in the Findings as Organized Crime available even now is far too uncertain and unauthoritative upon which to base any rational finding.

In its Findings, Congress stated, presumably as a reason for its action, that the existence of exclusionary rules of

evidence stricter than necessary for the protection of Constitutional rights has been among the factors which have rendered past efforts at prosecution almost wholly ineffective. Presumably, Congress feels that by bringing loan sharking under Federal prosecutorial procedures, the impediment caused by these exclusionary rules would be removed or reduced because the Federal exclusionary rules are less strict. Rather than belabor the point, suffice it to say that such a Congressional Finding boggles the mind and "amazes indeed the very faculties of eyes and ears."

With respect to the third excerpt from the Congressional Findings, Congress first finds that extortionate credit transactions are substantially carried on in interstate and foreign commerce and through the means and instrumentalities thereof. If a given extortionate credit transaction is carried on in interstate commerce and through the means and instrumentalities thereof, then that fact can be proven like any other during the criminal prosecution. Congress gives no reason nor can we think of any why the burden of proving such an element would be so great as to frustrate the legitimate purposes and interests of the Government.

Finally, Congress found that "even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce." This is the true quintessence of the Findings relative to the issues we raise herein. The lack of a rational basis for this particular Finding is eloquently established by what the Congress fails to find. Congress did not state how or why in intrastate extortionate credit transactions directly affect interstate commerce.

Of course, Congress did not find that each intrastate extortionate credit transaction directly affects interstate commerce. In the various cases decided by the Supreme Court and cited by this Court beyond authority for its conclusion that Chapter 42 is constitutional, the activities sought to be regulated by Congress under the Commerce Clause had on their face a very direct involvement with interstate commerce. To put it simply, the operation of a loan shark does not necessarily or even logically relate or affect interstate commerce except in the most tenuous way.

Appellant submits that there is no rational basis for the Congressional Findings embodied in Chapter 42 and that in the area of criminal sanctions, more than a rational basis would have to be found to support such a scheme. Nevertheless, should the court remain unconvinced by the above discussion, we submit that at the very least this court should remand this case to the Trial Court for a hearing on the question of the rationality of the Congressional Findings and Declaration of Purpose. The judiciary will have abdicated its function unless and until it is in a position to pass upon the rationality of the Congressional Findings obtained from a full evidentiary hearing at which the proper safeguards would apply. See *Leary* v. *United States,* 395 U.S. 6; *United States* v. *Adams,* 293 F. Supp. 776.

Conclusion

As To Staying the Issuance of the Court's Mandate and Continuing the Appellant on Bail Pending Application for a Writ of Certiorari to the Supreme Court.

If this Court should deny the instant petition for a rehearing the appellant Perez intends to present to the United States

Supreme Court a petition for a writ of certiorari. It is respectfully prayed that the issuance of the mandate of this court be stayed and the petitioner continued on bail until the determination of said petition for a write of certiorari.

Bail pending appeal as to appellant Perez has been heretofore set in the amount of Ten Thousand Dollars. It is respectfully submitted that the questions above discussed as well as those set forth in the original appeal are not frivolous but in fact are questions of great substance and significance which merit a review by the United States Supreme Court.

No prior application for the relief sought herein has been made.

For the foregoing reasons, appellant herein respectfully requests that a rehearing be granted or that, in the alternative, the issuance of the mandate of this court be stayed and the appellant Perez continued on bail pending the filing and disposition of his petition for a writ of certiorari to the Supreme Court of the United States.

Respectfully submitted,

ALBERT J. KRIEGER
Attorney for Appellant Perez
Office & P. O. Address
401 Broadway
New York, New York 10013
(212) WA5-5937

Dated: June 12, 1970

Appendix C—Petition for Rehearing

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ALBERT J. KRIEGER, being first duly sworn, on oath certifies and says:

That he is the attorney for the appellant in this cause; that he makes this certificate in compliance with the rules of this court; that in his judgment the within and foregoing petition is well founded and is not frivolous or interposed for delay.

ALBERT J. KRIEGER

(Subscribed and sworn to before me this 12th day of June, 1970)

IVAN S. FISHER
Notary Public, State of New York
No. 60-1231363
Qualified in Westchester County
Commission Expires March 30, 1971

Appendix C—Petition for Rehearing

Suggestion for a Rehearing in Banc

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket Number 33767

[Same Title]

The Petitioner, Alcides Perez, suggests to this court that his Petition for a Rehearing in the above-entitled case and filed on even date herewith be heard in banc for the following reasons:

(1) The issues raised by the Petitioner in his Petition for a Rehearing directly confront the issue of the constitutionality of Chapter 42, Title 18, United States Code, which proscribes extortionate credit transactions. The constitutionality of this Chapter was first presented for review to this Circuit in this case and has not been decided upon by the Supreme Court of the United States. The importance of the questions raised in Petitioner's appeal are of great significance.

(2) The decision entered by this Court affirming Petitioner's conviction came five months after oral argument and in this Court's Opinion it was acknowledged that Petitioner's argument had force.

(3) The issues presented in Petitioner's original appeal resulted in a division of the three-Judge panel and as a result Judge Hays wrote a strong dissent.

Appendix C—Petition for Rehearing

WHEREFORE, the Petitioner, Alcides Perez, respectfully suggests that he be granted a rehearing of the above appeal in banc.

Yours, etc.,

ALBERT J. KRIEGER
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Office & P.O. Address
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APPENDIX D

Order of the United States Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALCIDES PEREZ,

Defendant-Appellant.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that

1. The petition for rehearing is denied.

2. The mandate is stayed pending application for certiorari subject to Rule 41(b) of the Federal Rules of Appellate Procedure.

Appendix D—Order of the United States Court of Appeals Denying Rehearing

3. Appellant be allowed to continue on bail provided that a petition for certiorai is filed in accordance with said Rule 41(b).

STERRY R. WATERMAN
PAUL R. HAYS
WILFRED FEINBERG
Circuit Judges

July 1, 1970

APPENDIX E

Order of the United States Court of Appeals Denying Rehearing En Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

33767

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALCIDES PEREZ,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

July 1, 1970

APPENDIX F

ARTICLE 1, SECTION 8, CLAUSE 3 and CLAUSE 4:

Article 1, Section 8 of the Constitution of the United States provides in relevant part:

> "The Congress shall have power . . .
>
> Clause 3 To regulate commerce with foreign Nations, and among the several states,—
>
> Clause 4 To establish uniform laws on the subject of Bankruptcies throughout the United States;—"

FIFTH AMENDENT:

The Fifth Amendment of the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

TENTH AMENDMENT:

The Tenth Amendment of the Constitution of the United States provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Appendix F—Constitutional Amendments and Statutory Provisions

TITLE 28, UNITED STATES CODE, SECTION 1254(1)

§ 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By wri of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:

TITLE 18, UNITED STATES CODE, SECTION 891

§ 891. DEFINITIONS AND RULES OF CONSTRUCTION FOR THE PURPOSES OF THIS CHAPTER:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

Added Pub.L. 90—321, Title II, § 202(a), May 29, 1968, 82 Stat. 159.

TITLE 18, UNITED STATES CODE, SECTION 892

§ 892. MAKING EXTORTIONATE EXTENSIONS OF CREDIT

(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor

(A) in the jurisdiction within which the debtor, if a natural person, resided or

(B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and

interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b) (1) or (b) (2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

Added Pub.L. 90—321, Title II, § 202(a), May 29, 1968, 82 Stat. 160.

Appendix F—Constitutional Amendments and Statutory Provisions

TITLE 18, UNITED STATES CODE, SECTION 893

§ 893. FINANCING EXTORTIONATE EXTENSIONS OF CREDIT

Whoever willfully advances money or property, whether as a gift, as a loan, as an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit, shall be fined not more than $10,000 or an amount not exceeding twice the value of the money or property so advanced, whichever is greater, or shall be imprisoned not more than 20 years, or both.

Added Pub.L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 161.

TITLE 18, UNITED STATES CODE, SECTION 894

§ 894. COLLECTION OF EXTENSIONS OF CREDIT BY EXTORTIONATE MEANS

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more

extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b) (1) or the circumstances described in section 892(b) (2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

Added Pub.L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 161.

TITLE 18, UNITED STATES CODE, SECTION 895

§ 895. IMMUNITY OF WITNESSES

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter is

necessary to the public interest, he, upon the approval of the Attorney General or his designated representative, may make application to the court that the witness be instructed to testify or produce evidence subject to the provisions of this section. Upon order of the court the witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor may testimony so compelled be used as evidence in any criminal proceeding against him in any court, except a prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Added Pub.L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 162.

TITLE 18, UNITED STATES CODE, SECTION 896

§ 896. EFFECT ON STATE LAWS

This chapter does not preempt any field of law with respect to which State legislation would be permissible in the absence of this chapter. No law of any State which would be valid in the absence of this chapter may be held invalid or inapplicable by virtue of the existence of this chapter, and no officer, agency, or instrumentality of any

State may be deprived by virtue of this chapter of any jurisdiction over any offense over which it would have jurisdiction in the absence of this chapter.

Added Pub.L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 162.

RULE 19, SUPREME COURT RULES

Rule 19. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceed-

ings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.